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IN THE

Supreme Court of the United States

October Term, 1965

~~1965~~ 157

MORRIS KOLITCH and ALVIN REISCH,

Petitioners,

AGAINST

PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST DEPARTMENT

JACOB W. FRIEDMAN,
Attorney for Petitioners.

BERNARD JAY COVEN,
Of Counsel.

LODER APPEAL PRESS, INC., 41 VESEY STREET, NEW YORK, N. Y., WOrth-2-0689

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To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioners Morris Kolitch and Alvin Reisch respectfully pray for a writ of certiorari to review the judgment of the Appellate Division of the Supreme Court of the State of New York, First Department, affirming a judgment of the Supreme Court, New York County, convicting your petitioners of the crime of criminally concealing and withholding stolen and wrongfully acquired property and sentencing them to terms of imprisonment, and an order denying a motion to suppress evidence claimed to have been illegally seized.

Opinions Below

No opinion was rendered by the Appellate Division, whose judgment of affirmance is reported in New York Law Journal, February 2, 1966. The oral opinion of Loreto, J., denying the motion to suppress is contained in the appendix (A81-A82).

Jurisdiction

The judgment of the Appellate Division was entered on February 1, 1966. Your petitioners made timely application to Judge Stanley Fuld of the New York Court of Appeals for permission to appeal to that Court, which application was denied on February 25, 1966, so that the Appellate Division was the hightest state Court in which a decision could be had. Thereafter, on April 26, 1966, the Appellate Division granted your petitioner's motion to amend the remittitur, rendering the following memorandum opinion (New York Law Journal, April 27, 1966):

> "People, &c., v. Morris Kolitch and Alvin Reisch —Motion granted to the extent of amending the remittiturs to recite the following: 'Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States as follows: Defendants contended that their rights under the Fourth and Fourteenth Amendments to the Constitution were violated respectively, by unlawful searches and seizures and by the use of alleged confessions after denial of the right to counsel. Order filed."

The jurisdiction of this Court is invoked under 28 U. S. Code Sec. 1257(3) in that rights, privileges and immunities are claimed under the Constitution of the United States.

The petition is timely under 28 U. S. Code Sec. 2101 and Rule 22 of the Rules of this Court.

Facts and Proceedings

Inasmuch as the points of law relied upon by your petitioners involve consideration of the proof relating to the constitutional questions, the testimony will be discussed in connection with the argument.

Questions Presented and Reasons for Granting Writ

1. Were petitioners subject to an illegal search and seizure in violation of the Fourth Amendment?

2. Was refusal to grant petitioner Reisch's request to consult with an attorney a testimonial compulsion, a denial of right to counsel and an invasion of due process?

3. Did the use of an uncorroborated and uninvestigated statement of an unidentified informer constitute probable cause for search or arrest?

ARGUMENT

POINT I

Petitioners were subjected to an illegal search and seizure in violation of the Fourth Amendment.

The point about to be argued was seasonably raised prior to trial, and was urged on the appeal to the Appellate Division, as appears from that Court's ruling quoted above under "Jurisdiction".

A motion to suppress on constitutional and statutory grounds was made on behalf of the defendant Leibowitz and it was agreed between the district attorney and defense counsel that the other defendants (petitioners herein) would join and participate in the motion and be bound by the determination of the Court (A23). A hearing on the motion was held on May 23, 1963, before Honorable Charles A. Loreto, Justice of the Supreme Court. The testimony at the hearing is now reviewed:

Det. Francis Shannon of the Safe, Loft and Truck Squad of the Police Department of the City of New York, called by defense counsel testified that he arrested the three defendants on December 3, 1962 (A24). He first saw them at about 2:50 P. M. on that day, standing in conversation for about three minutes at the northwest corner of 20th Street and Broadway, New York City (A24-A25). Reisch then walked south on Broadway and Kolitch and Leibowitz got into a truck which had been parked nearby at the back end of a bus stop. The latter two remained there for about five minutes and then drove south on Broadway to 18th Street and parked on the south side of 18th Street east of Broadway, where Reisch was standing on the sidewalk. Leibowitz and Kolitch got out of the truck and opened its side door. They removed about five or six boxes of Gillette razors and placed them on the sidewalk. Reisch picked up two of these boxes and brought them into premises No. 28 East 18th Street, a drug and appliance store, through a side entrance (A25-A26, A46).

Shannon and his partner, Detective Carlopio, approached Kolitch and Leibowitz, and Shannon first interrogated Leibowitz while Carlopio interrogated Kolitch. Carlopio then questioned Leibowitz, and Shannon questioned Kolitch (A26). Shannon asked Kolitch where he had gotten the Gillette razor blades that were on the truck and Kolitch

stated that he had gotten them up in Yonkers. Shannon asked him if he had a bill of lading and Kolitch "just didn't answer me and every question I asked him he repeated" (A47). Leibowitz said to Shannon that he was just driving the truck and did not know what merchandise was in the truck (A47).

Meanwhile, Reisch came out of the store and Shannon went over to him. Shannon asked him what he was doing Reisch said that he was walking down the street. Shannon asked him whether he took two cartons into 28 East 18th Street, and Reisch replied that he did not. Shannon then said, "Okay, come on with me, let me go back into the store". Shannon also put this last this way: "I took him back into 28 East 18th Street the store where he had come from" (A40). Another variation of what Shannon said to Reisch at this point is, "Come along, we will go in and find out" (A46).

Then Shannon testified, "When he started to walk to the store, he said, 'Look, don't get us in trouble from here, I just left these two cartons of Gillette razor blades,' and then he said, 'These blades are stolen from Chicago, these two fellows outside are pretty tough characters,' he says, 'I will cooperate with you.' That was the end of the conversation" (A40, A46). Shannon testified that when Reisch made the statement to him at 28 East 18th Street that the merchandise had been stolen, Reisch was placed under arrest (A39).

Shannon said that he arrested the defendants at East 18th Street at about 3:00 P.M. after these conversations, which lasted about fifteen minutes (A50). He had no arrest or search warrant (A27). The boxes of blades which had been taken from the truck were put back there by the police (A32). The defendants were then taken to the squad room at 400 Broome Street, Reisch and Kolitch being taken

by Carlopio in a police car, and Leibowitz going with Shannon in the truck. The defendants arrived at the squad room at about 20 minutes after 3 and remained there with Det. Shannon until about 11:30 P.M. (A28, A50). There were 287 cartons of different sizes of Gillette products on the truck (A47).

Shannon testified that he had information from an informant that the merchandise was stolen (A33). The Court did not permit inquiry as to whether the informant was a man or a woman, whether he was a regular paid police informer, and what his name was (33-A34). Shannon had talked to the informant "a couple of years," and the informer had given him reliable information on a number of occasions on matters of a criminal nature (A33-A34).

Shannon testified that the information came about this way: The informant called Shannon's office at about 11 A.M. on December 3, 1962, and left a message for Shannon to call a particular telephone number at 1 P.M. (A35, A42). Shannon did not remember the number and had no record of it. He said that he had made a notation of the number, but had thrown it away (A48). Shannon made the call at 1 P.M. from a pay booth on Broadway and West Houston Street (A35), and the informer gave him a description of a truck, but not its license number, and said that "they would be in front of 18th Street and Broadway with stolen Gillette products," at about 2:00 P.M. (A36-A38, A48, A52). No description of the persons was stated, nor how many would be there (A38). The truck was described as having a red cab and yellow body with the name "AA Truck Rental" on it (A45). The informant did not mention the quantity of stolen merchandise, nor did he say that it was stolen from Chicago. Shannon made no note or record of the information given to him by the informer (A48).

Det. Attilio Carlopio, called by defense counsel, testified that Shannon told him after the telephone call of 1 P.M. that he spoke to an informant and that there would be some stolen property from the Gillette Company in the vicinity of 19th Street and Broadway at approximately 3 o'clock in a truck of "AA Trucking" with a red and yellow body (A54). He and Shannon arrived at 19th Street and Broadway at about 2 o'clock and they cruised around until they saw the truck at about 2:50 P.M. on Broadway south of 20th Street (A54). Det. Carlopio testified, as had Shannon, that Kolitch and Leibowitz got into the truck, Leibowitz driving, and Reisch proceeded south on Broadway. The truck drove to 18th Street east of Broadway, where Reisch was waiting. They parked the truck, Leibowitz opened the side door and started handing boxes out to Kolitch and Reisch. The cartons were exposed, with no covering on them (A55). Reisch took two boxes into the premises on 18th Street; the officers approached Leibowitz and Kolitch and identified themselves (A55, A70-A71). The following then ensued:

> "Leibowitz was still in the truck and we asked Kolitch whose property this was and he didn't say anything. I asked him again 'Whose property is this,' and he said, 'I don't know' and I asked Leibowitz 'What do you know?' He said, 'I don't know anything.' He got out of the truck. Then I further questioned Kolitch and he couldn't say whose it was or where he got it from. Detective Shannon was speaking to Leibowitz when I spoke to Leibowitz and asked him what he could tell me about the property.
>
> Q. On the sidewalk, this was? A. Yes. This all took place on the sidewalk, and I asked him if he knew whose property it was and he said 'No,' and I asked him if he knew where it came from and he said, 'No'. At this point Reisch walked out of the

> place he had walked into and Detective Shannon approached him. In minutes, or so, they walked into the premises again and I was still speaking to Leibowitz and Kolitch. In a few minutes, Detective Shannon came out and I took Reisch into the cab of the truck and asked him where did this stuff come from —what do you know about it. He said, 'Well, I'll tell you. I got a 'phone call this morning at home and it was a man' and I said, 'Well, who?' and he said, 'I don't know,' and I said, 'What did he tell you'. He said, 'He told me that this stuff that I was buying was stolen in Chicago.' I placed him under arrest'' (A55-A56).

Det. Carlopio did not tell the petitioners why they were being arrested. He did not have an arrest warrant or search warrant (A63). Between 1:00 P. M., when the information was received from the informant and 2:50 P. M., when the petitioners were first sighted, no attempt was made to secure a warrant of arrest (A64).

At 400 Broome Street the petitioners were separately interrogated again. *After the arrest* the officer asked Reisch whether or not he knew that the merchandise had been stolen (A67). Ultimately the other two defendants said that they knew it was stolen (A67). That afternoon teletypes were sent out to other states with respect to the stolen merchandise (A68). The defendants were arraigned the next morning (A66).

Detective Carlopio did not know who the informer was, and had never met him (A71). He did not know if Shannon wrote the number down on a piece of paper (A73).

At the close of the testimony, counsel for Reisch requested the Court to direct the district attorney to produce

the informant or to give defense counsel the name and address of the informant to enable them to subpoena him. The Court declined to make such a direction (A74).

At the conclusion of the testimony the Court made the following decision (A79-A80):

> "Upon the evidence adduced the Court finds there was probable cause for making the arrest of these three defendants.
>
> First there is the information imparted by an unidentified informant with whom the officer stated he had prior experience over two years on several occasions including stolen goods, crimes, the information was given subsequently in court, whereby a truck was described with particularity, including the name on the truck; the place the truck would be seen was given and the name of the goods together with a description of the cartons was given, all of which gave reason to keep the truck under surveillance. There were three persons adjacent to the truck, on the truck, in the truck at the first place were seen later on 18th Street in control of the truck handling this goods gave rise to more than suspicion..
>
> There is almost immediate commission of crime in the presence of the officer. Prior to the arrest, almost within a few minutes after the truck had come to a stop at 18th Street there is the admission by one of the defendants who also admits knowledge of the other two defendants. The other two defendants under such circumstances, deny knowledge of the source of the goods. That certainly presents a denial that could hardly be accepted as a full one by one who would be required to appraise facts.

> For these reasons the Court finds that there was no unlawful search and seizure established by the defendants and the motion is denied."

The search and seizure of the Gillette cartons from Kramer's store and from the rented truck, and the use of the cartons against petitioner were legal only as incidental to lawful arrest (*People* v. *Santiago*, 13 N.Y. 2d 326, 331). The legality of an arrest is governed by state law (*Johnson* v. *United States*, 333 U.S. 10, 15; *United States* v. *DiRe*, 332 U.S. 581, 589; *United States* v. *Viale*, 312 F. 2d 595, 599 [2nd Cir.]).

Under §177 of the New York Code of Criminal Procedure, a peace officer may, without a warrant, arrest a person,

> "1. For a crime, committed or attempted in his presence, or where a police officer . . . has reasonable grounds for believing that a crime is being committed in his presence;
>
> 2. When the person arrested has committed a felony, although not in his presence;
>
> 3. When a felony has in fact been committed, and he has reasonable cause for believing the person to be arrested to have committed it;
>
> 4. When he has reasonable cause for believing that a felony has been committed, and that the person arrested has committed it. . . ."

In the case at bar, the arrest was lawful if the officers had reasonable cause to believe that a felony had been committed and that petitioners had committed it. The terms "reasonable cause," as used in the Code, and "probable cause" as used in the Fourth Amendment of the

Constitution, are substantially equivalent in meaning (*Cf. Draper* v. *United States*, 358 U. S. 307, 310 in interpreting a similar statute).

The determination of probable cause must be based totally on the facts and circumstances known to the arresting officers before the arrest. As was said in *People* v. *McCarthy*, 14 N. Y. 2d 206, 209:

> "The validity of an arrest without a warrant depends upon the existence of probable or reasonable cause as justification for the making of the arrest, and such cause cannot be based on evidence obtained as a result of a search when the validity of the search itself depends upon the validity of the arrest (*People* v. *Loria*, 10 N. Y. 2d 368)."

In the case at bar, the issue of the legality of the arrest turns on the question of when the arrest took place. Detective Shannon testified that at 11:00 A.M. on December 3, 1962, he made a call to his office and was given a message to call a certain number at 1:00 P.M. He said that he made a record of the number but that he threw the paper away and he did not remember the number. He testified that he made the call at 1:00 P.M. and spoke to an unnamed informant, whom he had known for a couple of years and who had given him reliable information on a number of occasions. Surprisingly enough, Detective Shannon did not tell his partner, Detective Carlopio, either the telephone number or the name of the informant (A248). The informant told Detective Shannon that there were stolen Gillette cartons on an AA rental truck, with a red cab and yellow body, which would be in the vicinity of 18th Street and Broadway at about 2:00 P.M. that day. The informant did not mention the quantity of cartons involved nor where they were stolen

from, and he did not name or describe the persons who would be on the truck.

At about 2:30 or 2:50 (there is testimony as to each time), Detective Shannon saw a truck answering the description on Broadway and 20th Street and the three defendants standing nearby in conversation. After a few minutes, Reisch walked down Broadway and Kolitch and Leibowitz entered the truck and drove to 18th Street east of Broadway and parked the truck there, meeting Reisch who apparently had arrived there first on foot. They unloaded about five or six cartons onto the sidewalk and Reisch then took two of these cartons into a side entrance of an appliance store. At this point, the detectives approached Leibowitz and Kolitch, identified themselves and interrogated the two men. The testimony here varies, depending upon whether one reads what Detective Shannon said or what Detective Carlopio said, and whether one reads the minutes of the hearing or the minutes of trial. The most frequent theme is that Kolitch said that he had gotten the cartons in Yonkers and otherwise he answered no questions, and Leibowitz said that he was just driving the truck and did not know what merchandise was in the cartons or who owned it (see A47, A133, A220-A221).

While the other two were being interrogated, Reisch emerged from the store and Shannon went over to him. According to Shannon, he asked Reisch either what he was doing or where he had come from (A40, 3133), and Reisch replied that he was just walking down the street. Shannon asked him either whether he took two cartons into the store or what he did with the two cartons (A40, A134), and Reisch either denied taking the cartons into the store or said, "What cartons?" (A40, A134).

Shannon then said, "Okay, come on with me, let me go back into the store" (A40) or "Come along, we will go in

and find out" (A46), and "I took him back into 28 East 18th Street, the store where he had come from" (A40), as he said on the hearing of the motion to suppress, or "Okay, let's go into this store where you just came from," or "Okay, come on back and we will go into the store" (A134, A166), as he testified upon the trial. Then, Shannon testified, "When he started to walk to the store, he said, 'Look don't get us in trouble from here, I just left these two cartons of Gillette razor blades,' and then he said, 'These blades are stolen from Chicago, these two fellows outside are pretty tough characters,' and he says, 'I will cooperate with you.' That was the end of the conversation" (A40, A46, A134). Shannon testified, "He (Reisch) was arrested when he made the statement to me that he knew it was stolen, he had knowledge of it" (A39, A167, A169).

It is the contention of petitioner Reisch that when Detective Shannon said, "Come on back and we will go into the store," or words to that effect, and "took" him back to the store, he (Reisch) was not free to leave, he was under the restraint and in the custody of Detective Shannon, and he was then and there, to all intents and purposes material to the determination of the validity of his arrest, under arrest. If this is so, the question is whether at or before that time the officers had reasonable cause to believe that a felony had been committed and that Reisch had committed it.

An arrest is defined by §167 of the New York Code of Criminal Procedure as "the taking of a person into custody that he may be held to answer for a crime." Section 171 adds, "An arrest is made by an actual restraint of the person of the defendant, or by his submission to the custody of the officer." In *Henry* v. *United States*, 361 U.S. 98, this Court held (at p. 103):

> "When the officers interrupted the two men and restricted their liberty of movement, the arrest, for purposes of this case, was complete."

In *Sobel, Current Problems in the Law of Search and Seizure,* the author states (at p. 64):

> "Whether the police term the detention 'custody' or 'arrest' it is clear that just as soon as dominion is exercised over the person, an arrest takes place (*People* v. *Brown* (Cal.), 290 P. (2) 528; *U.S.* v. *Viale,* 312 F. (2) 595, 601)."

Thus, in *People* v. *Lane,* 10 N.Y. 2d 347, 353, the Court said,

> "It is conceded that the arrest took place at the time that Sergeant Decker and Officer Cerone approached the car with guns drawn and ordered the two occupants out" (citing cases).

Reisch testified that when Shannon came over to him after he (Reisch) emerged from the store where he had left the two cartons, Shannon flashed a badge, grabbed his arm and said, "I am a detective from the New York City Police, you are under arrest," and Shannon added, "Let's go", and led him into the store. Whether or not Shannon used the formal words of "you are under arrest" is immaterial. Likewise immaterial is whether or not Shannon grabbed Reisch's arm, for restraint upon freedom may be imposed by the assertion of legal authority to which the accused submits.

"Any restraint of liberty is an arrest" (*People* v. *Esposito,* 118 Misc. 867, 872 [N. Y. Spec. Sess., Edwards, P.J.]).

In *United States* v. *Viale,* 312 F. 2d 595 (2nd Cir.), Special Agents of the Internal Revenue Service raided

two houses without search or arrest warrants and found some of the defendants in a second floor room in one of the houses, along with wagering paraphernalia. One defendant entered the ground floor of this house about two hours later and upon entry was told by the Agents to go up to the second floor room. Thereafter each of the defendants was interrogated separately and was asked to empty his pockets. Each stated that he was there to visit a sick friend and refused to answer any further questions. They voluntarily emptied their pockets and each possessed a key to the premises and other incriminating matter. The Court held with respect to the defendants who were found in the second floor room that their arrest took place the moment when they submitted to the custody of the Agents, and as to the defendant who entered the premises two hours later, the Court held that his arrest took place when he was ordered to go upstairs (312 F. 2d 595, 601).

In *People* v. *Colletti,* 223 N.Y.S. 2d 948 (not officially reported) (Co. Ct., Queens Co., Bosch, J.), a motion to suppress was granted, where the defendant was approached by police upon her leaving a bakery, and they exhibited their badges to her and told her to come with them across the street to her own apartment where a search was made uncovering the subject matter which the defendant sought to suppress. The Court held (223 N.Y.S. 2d, at p. 952):

> "The Court finds that at the time the defendant, Kathleen Colletti, was approached at the entrance of the bakery she was arrested."

In *People* v. *Gallo,* 207 Misc. 161, 162 (Mag. Ct., Serper, J.), cited in the *Colletti* case, *supra,* the Court held that an arrest took place when "Patrolman Nigro ap-

proached the defendant, identified himself as a police officer, showed his shield to the defendant, and said, 'Let's go upstairs.' This the defendant did."

In *People* v. *Jones*, 38 Misc. 2d 125 (Co. Ct., Monroe Co.), the defendant, carrying a suitcase, was walking along a state highway in the night when he was stopped by two state police officers in a patrol car. He was asked to enter the police vehicle and was questioned as to his name, age, residence and then was told to stand in front of the car, which he did. A radio call was made to headquarters to check the records concerning the defendant and an answer was received that he was not wanted for any crime. The defendant was then asked whether or not he possessed a gun. He answered in the affirmative and he was questioned about where he kept it. He replied that it was in the suitcase which he had in his possession, and he was asked to open it, which he did, revealing a revolver mixed together with his clothes. He was then arrested for illegal possession of a firearm. In suppressing the revolver and the consequent confession of the defendant as products of an unreasonable search, the Court held that, "The continued questioning and the holding of the defendant amounted to arrest" (38 Misc. 2d, at p. 128).

In *People* v. *Brown*, 225 N. Y. S. 2d 157 (not officially reported) (Co. Ct., Queens Co., Shapiro, J.), a motion to suppress was granted when the arresting officer observed the defendant "carrying and half dragging" a suitcase on the street and then saw the defendant place the "trunk" behind a bench and the defendant sat down on the bench. The detective approached the defendant, identified himself and asked him, "Where did you get the valise?" to which the defendant replied, "What valise?" The detective testified that he then informed the defend-

ant that he had had him under observation "for the past five minutes and that" "I had seen him dragging the valise toward Hillside Avenue *and he became evasive and refused to answer any more questions and he was taken to the 103 precinct for further investigation*" (p. 158) (Italics in original). The Court held (225 N.Y.S. 2d at p. 160):

> "The validity of an arrest depends upon the existence of probable cause to make the arrest. In this case the police officer did not know that a burglary had in fact been committed nor did he have probable cause to believe that any felony had been committed and therefore he had no probable cause to arrest the defendant (People v. Ward, sup., 223 N.Y.S. 2d 355 [N.Y.L.J., 1/16/62, p. 17]) since what the defendant was doing did not constitute the commission of any crime in his presence."

It is to be noted that in the *Brown* case, *supra,* neither the defendant's evasive answers nor his actual possession of stolen merchandise, factors relied upon by the Court in its decision in the motion to suppress in the case at bar (A79-A80), were deemed to establish probable cause.

We do not dispute that the police have a right to interrogate a suspect as part of a routine investigation and that such interrogation does not constitute an arrest. In *People* v. *Entrialgo,* 19 A.D. 2d 509 (2nd Dept.), aff'd 14 N.Y. 2d 733, the Court said (at p. 511):

> "The precise time at which an 'arrest' occurred within the meaning of section 167 of the Code of Criminal Procedure, should be determined as a question of fact whenever such time becomes a relevant factor (*Rios* v. *United States,* 364 U.S.

253, 262). In the present case, it should be borne in mind that police have the right to approach persons for the purpose of routine investigation; and that such investigation does not constitute arrest (*Rios* v. *United States, supra; United States* v. *Vita,* 294 F. 2d 524, cert. den. 369 U.S. 823; *Busby* v. *United States,* 296 F. 2d 328, cert. den. 369 U.S. 876). Whether the detention of this defendant for questioning was for more than a reasonable period of time should be determined as a question of fact within the rules stated in *United States* v. *Vita* (*supra*), where it was held, contrary to the opinion of the court below, that detention even for 10 hours after the defendant there had been taken in an F.B.I. car to F.B.I. headquarters was not an unreasonable detention."

In *Entrialgo, supra,* the Court referred to the rules stated in *United States* v. *Vita,* 294 F. 2d 524 (2nd Cir.), cert. den. 369 U.S. 823, to determine when detention ceases and arrest begins. In *Vita,* the Court said (at p. 534):

> "We believe that when a continuing process of essential investigation is being carried out expeditiously, *when the suspect is advised of his constitutional rights,* and when there is no reason to believe that the procedures being followed are used merely as an excuse for delay during which a confession can be extracted, detention is 'arrest', and in any event is not 'unnecessary,' and an uncoerced confession so obtained is admissible." (Italics supplied.)

In *Vita,* one of the rules so established is that the suspect be "advised of his constitutional rights." This was

not done in the case at bar. In *Vita,* there was specific testimony by the agents that the defendant was told that he was not under arrest, that he was free to leave at any time, that anything he said could be used against him and that he had the right to counsel (294 F. 2d, at p. 528). Reisch was not told that he was not under arrest, he was not old that he was free to leave, he was not told of his privilege against self-incrimination and of his right to counsel. We dare say that if Reisch had refused to accompany Detective Shannon into the store, Detective Shannon under the circumstances could well have been in a position to draw his gun. That Reisch submitted to the detective's authority and accompanied him does not lessen in the slightest degree the restraint under which he was placed.

The *Entrialgo* case, *supra,* also cited *Busby* v. *United States,* 296 F. 2d 328 (9th Cir.), cert. den. 369 U.S. 876. In *Busby,* an officer stopped a car at 1:00 A.M. for a traffic violation. Another officer, who had received information from a bartender that the defendant admitted to him having been involved in an armed robbery, came up and the occupants of the car were ordered out. The dome light of the car revealed a sawed-off shotgun and the occupants were arrested. The Court held that there was no arrest when the car was stopped and the occupants ordered out under California law defining arrest as the "taking a person into custody" and did not pass upon the question as to whether there existed probable cause to make the arrest prior to the time when the officers sighted the shotgun in open view in the car. There is no similarity between the *Busby* case and the case at bar and *Busby,* it is submitted, is not in point here.

The *Entrialgo* case, *supra,* also cites *Rios* v. *United States,* 364 U.S. 253. In *Rios* two Los Angeles police officers approached a taxicab in a district known for

"narcotics activity" after having seen the defendant look up and down the street, walk across a parking lot and get into the cab. As the officers approached the cab, which had stopped for a traffic light, the defendant dropped a recognizable package of narcotics to the floor of the vehicle in the view of the policemen. This Court said (364 U. S., at pp. 261-262):

> "If, therefore, the arrest occurred when the officers took their positions at the doors of the taxicab, then nothing that happened thereafter could make that arrest lawful, or justify a search as its incident. . . . The validity of the search thus turns upon the narrow question of when the arrest occurred, and the answer to that question depends upon an evaluation of the conflicting testimony of those who were there that night."

The *Rios* case was therefore remanded to the District Court to evaluate the conflicting evidence in order to determine when the arrest had been made. In the case at bar, in support of our argument that Reisch was arrested when he was directed by Officer Shannon to accompany him into the store and Shannon took him there, we have relied upon the testimony of the detective and not upon the testimony of Reisch that the officer grabbed his arm and said that he was under arrest. Even with the issue of fact resolved in favor of the People, we have shown, we respectfully submit, that upon the officers' testimony, an arrest took place when Reisch was taken back to the store and before he made any incriminating statements.

In *James* v. *Louisiana,* 382 U.S. 36, this Court recently held that a search without warrant of petitioner's home in the vicinity of the arrest was not incident thereto, and that it was constitutional error to admit the fruits of the illegal search into evidence.

POINT II

The refusal to grant petitioner Reisch's request to consult an attorney was a denial of his constitutional rights, and in any event he was entitled to a hearing on the issue of his alleged incriminating statements.

The arrest of the petitioners took place at East 18th Street and Broadway at about 3:00 P.M. The petitioners were then taken to the Safe, Loft and Truck Squad at 400 Broome Street, and, according to the detectives, after the cartons were inventoried, the petitioners were again interrogated. Detective Carlopio testified that he questioned the three defendants separately, starting with Kolitch, at about a quarter to 4 P.M. and that the interrogations took about an hour or so (A222, A225). Detective Shannon testified that he interrogated the petitioners in the squad room after 5:00 P.M. (A135). Both detectives testified to admissions made by Reisch that he bought from Kolitch ten cartons of the Gillette products for $1,350, that he would help Kolitch get rid of the remaining products and that he knew they were stolen.

Reisch, testifying in his own behalf, denied telling Shannon or Carlopio that he had known the merchandise was stolen, that it was stolen from Chicago, that the other two men were tough characters and that he would cooperate (A273). He testified that during the period from about 3:20 P.M. of December 3, 1962, until 2:30 A.M. of December 4, 1962, the period of time that he was kept in the squad room, on several occasions (times not stated) he asked for permission to call his attorney and to call his home, and that he was not permitted to do so. His testimony to this effect is:

> "Q. During the period from about 20 after 3 of December 3, 1962, up to the point of roughly 2:20

or 2:30 of December 4th of 1962, what, if anything were you doing at the police precinct, that is 400 Broome Street? A. On several occasions I asked whether or not I could make several phone calls. They asked me to whom.

No. 1, I wanted to get in touch with my attorney; No. 2, I wanted to notify my home who were expecting me home for dinner that I was going to be delayed, and on every occasion I was given very flippant answers that this is not the propitious time, and I was just put off" (A273).

Both detectives, called in rebuttal, denied that Reisch asked them to "get him" an attorney, or for permission to call an attorney (A353-A354). They were not asked whether Reisch sought to call his home.

After 2:30 A.M. the petitioners were taken to the 13th precinct for booking. Reisch testified that from the 13th precinct he made a telephone call to the home of his attorney on the morning of December 4th (A274).

Early in the trial, during the cross-examination of Detective Shannon, there was a discussion with the Court with reference to the applicability of *Escobedo* v. *Illinois*, 378 U.S. 478, to the case at bar, which came about when the attorney for Leibowitz moved to strike out and suppress Leibowitz's alleged admissions at the squad room on the ground that they were made after his arrest. It is to be noted that the question was not raised because of any request by Reisch to call his attorney and his home, as to which no testimony had yet been given. The discussion and the motion by Leibowitz's attorney are set forth at pages 201 to 202 of the Appendix.

After the testimony on the trial was completed, the attorney for Reisch made a motion to dismiss the indict-

ment on several grounds (A363-A370), and his argument included the following:

> "We also maintain that the taking of the defendant Reisch to Broome Street and arriving there at or about 3:20 in the afternoon and not booking this particular defendant until 2:30 of the morning of December 4th, constitute an illegal detention and denial of the right of this particular defendant to a speedy trial and to be arraigned as rapidly as is legally convenient.
>
> Therefore, in addition to the fact that there was an illegal detention that any statement alleged to have been made by Mr. Reisch during that period was wholly invalid" (A367).

The district attorney and the Court both held that Reisch's motion involved the *Escobedo* case. After the conclusion of argument by defense counsel on their respective motions to dismiss, the district attorney said the following (A373-A374):

> "Mr. Nadjari: I would like to address myself to the defendant Reisch's motion and only to one limited portion.
>
> Among other things he seemed to be relying on the *Escobedo* v. *Illinois*. Counsel said he didn't believe the confession was proper. If you recall, we had an extended offer of proof by each attorney in this case in reference to the *Escobedo* case and prior to the admission of confession in this case.
>
> At that time each of the defendants' attorneys on the record did indicate to the Court that because the defendants had not been warned of their rights by the police officers prior to the confessions being made that the confessions were inadmissible in evidence.

At that time your Honor pointed out to the attorneys that there was another prerequisite necessary before the admission should be disregarded or before we come on all fours under *Escobedo*.

We point out quite properly that *Escobedo* maintained that where a defendant is not warned of his rights and where, in fact, he has requested the presence of an attorney and that request has been denied, that then the confession may be inadmissible in evidence.

At that point all of the attorneys sat down. Our discussion concerning that very point was completed.

So the evidence went in and it wasn't until the very moment that the defendant Reisch took the stand and testified that he requested an attorney at the Safe & Loft Squad that any of us were ever aware of the fact that any defendant had made a request for an attorney.

I point to the fact that the defense does not indicate that Reisch made this request at the time it was discussed at the side bench.

I make this point, your Honor, because it is in complete conflict with what the defendant himself has indicated, that he stated that he did ask for an attorney. Quite the contrary was implied at the bench by all of the attorneys when we discussed it.

I make this point, your Honor, because obviously in denying the defense motion, and correct me if I am wrong, you have to come to the conclusion that even if a separate hearing was had concerning the confession of Reisch made in the squad, that you would have come to the conclusion that the confession was a voluntary one and that the defend-

ant had not, in fact, asked for an attorney and that the confession was admissible and submitted, I believe, to the jury."

In agreeing with the district attorney, the Court said that no hearing had ever been asked for with respect to the voluntariness of Reisch's "confession" under *Jackson* v. *Denno*, 378 U.S. 368, and the Court further said that Reisch's testimony with respect to asking for an attorney was controverted by the rebuttal testimony of Detective Shannon, so that if such a hearing had been asked for, the Court would have ruled that the confession was voluntary and that the jury be permitted to take it into consideration. We quote the Court's statement and ruling in full (A374-A375):

"The Court: I think that is a very fair statement and I will expand upon it. Of course, no hearing was ever asked for with regard to the voluntariness of the confession under the *Jackson* case, or any other, and as you stated, the first time we heard anything about a request for a lawyer was when Mr. Reisch himself took the stand, an actual request having been made.

Even that testimony by Mr. Reisch made reference to a request for a lawyer at 400 Broome Street. There is testimony here by Detective Shannon that certain admissions were allegedly made by Defendant Reisch on 18th Street in the store and there is no testimony or evidence about his having asked for a lawyer at that time.

He does testify that he asked for a lawyer at a later time. This is again said, this is controverted by the rebuttal testimony of Detective Shannon, so therefore I think your statement is correct, Mr. District Attorney, that if a hearing had been asked

> for on the question of the voluntariness of this alleged confession or admission against interest on the basis of the evidence, the controvening of the statement by Detective Shannon, I would still have to submit the matter to the jury and I would have ruled with regard to such a motion that the testimony was voluntary and that the jury be permitted to take—that the alleged admission was voluntary and that the jury be permitted to take it into consideration.
>
> All right, all three defendants have exceptions to the statement or ruling on my part."

In its charge to the jury, the Court in its review of the the testimony alluded to Reisch's testimony that he was denied permission to call his attorney and his home. The Court said in its charge (A406-A407):

> "He claims that at the precinct he asked for permission to call his attorney and also call his home to tell his family he wouldn't be home, and he said such calls were denied to him after—until after he had been arraigned in court the next morning on December 4th, 1962."

The Court did not, however, instruct the jury as to the significance of this testimony.

The holding by the Trial Court that because Reisch's testimony of having been refused permission to call his attorney was refuted by Detective Shannon, and the resultant finding by the Court, without an independent hearing, that the "confessions" allegedly made by Reisch at the squad room were voluntary and that the jury should be permitted to take them into consideration, were grave errors, substantially prejudicing the rights of appellant Reisch. Furthermore, the issue rasied by

Reisch's testimony that he sought permission to call his attorney and to call his home was not properly presented to the jury. The Court merely referred to such testimony in its charge to the jury, without telling the jury the effect thereof.

Although there is no obligatory requirement of New York State law to warn an accused of his right to counsel and his privilege to refrain from making a statement after his arrest (*People* v. *Randazzio,* 194 N.Y. 147; *People* v. *Gunner,* 15 N.Y. 2d 226), it is unquestionably the law that a refusal to grant a request of an accused to consult with his attorney impinges upon the fundamentals of protection against testimonial compulsion and of the right to counsel, as well as upon our own guarantee of due process, and renders inadmissible a statement thereafter taken of the accused (*People* v. *Noble,* 9 N.Y. 2d 571; *People* v. *Donovan,* 13 N.Y. 2d 148; *People* v. *Failla,* 14 N.Y. 2d 178; *People* v. *Sanchez,* 15 N.Y. 2d 387). In *Escobedo* v. *Illinois,* 378 U.S. 478, the United States Supreme Court made its decision a constitutional requirement to be followed in the state courts.

In *People* v. *Sanchez,* 15 N.Y. 2d 387, the Court of Appeals commented upon the error inherent in a charge to the jury that if a lawyer is prevented by the police from conferring with his client, such fact is relevant only "on the question of the voluntariness" of the defendant's subsequent admissions. The Trial Court below seems to have been laboring under the same error as the Trial Court in the *Sanchez* case, for, as aforequoted at length, the Trial Court below said, "I would still have to submit the matter to the jury and I would have ruled with regard to such a motion that the testimony was voluntary and that the jury be permitted to take—that the alleged admission was voluntary and that the jury be permitted to take it into consideration" (A374-A375).

In *Sanchez,* the Court pointed out that if the attorney was denied access to his client, the jury was to exclude from consideration any statements thereafter obtained from the defendant. In the case at bar, the Court gave no instruction to the jury that if they found that Reisch was refused permission to consult with his lawyer, they were to exclude any admission or confession thereafter made. The Court's failure to so charge the jury deprived appellant Reisch of his rights under the federal and state constitutions and constitutes reversible error.

With respect to Reisch's request for permission to call his family, there was no contradictory testimony by the police although they did contradict his testimony that he requested permission to call his lawyer. In *People* v. *Taylor,* 22 A.D. 2d 524, the Court held that where a defendant has requested to see his family and such request was denied, any confession thereafter obtained by the police is inadmissible against him upon the trial.

Since *People* v. *Huntley,* 15 N. Y. 2d 72, decided January 7, 1965, it is the law that as to trials already concluded, which would include the instant case, the trial of which took place from October 8, 1964 to October 20, 1964, that

> "(1) *As to trial already concluded:*
>
> (a) No *Jackson-Denno* hearing will be necessary in cases where a confession was admitted without any objection by the defendant or any assertion by him or his witnesses as to voluntariness. Even in these cases, however, if the trial court has charged the jury on voluntariness the issue was in the case and a new hearing is indicated.
>
> (b) As to the type of hearing to be had, there is no constitutional impediment to using the prior

record provided that the defendant and the People are permitted to put in additional proof if either side so desires. Where possible, the new hearing will be held before the Judge who previously presided at the *voir dire*, if any, or the trial proper. The defendant should be provided counsel if he so desires. The court, after holding the *Jackson-Denno* hearing, shall put into the record a decision containing specific findings of fact and conclusions of law. In these cases already concluded there is no need, since the jury has already passed on the matter, again to submit to the jury the question of voluntariness" (*People* v. *Huntley, supra*, at pp. 77-78).

It has been held that the same procedure outlined in *Huntley* when there is an issue as to voluntariness of a confession, applies to a case where there is an issue as to whether the defendant was denied permission to talk to his counsel or to his family, after which he made an incriminating statement (see *People* v. *Taylor*, 22 A. D. 2d 524, 526 [1st Dept.]; *People* v. *Perry*, 24 A. D. 2d 611 [2nd Dept.]) It is thus clear that petitioner Reisch is entitled to an independent hearing of the question of whether he asked for permission to call his lawyer and his family before he made any incriminating admissions at the squad room, and after such hearing, the Court should make a written decision containing specific findings of fact and conclusions of law (*People* v. *Bischone*, 24 A. D. 2d 575 [2nd Dept.]; *People* v. *Korda*, 24 A. D. 2d 577 [2nd Dept.]; *People* v. *Narducci*, 24 A. D. 2d 578 [2nd Dept.]; *People* v. *Mitchell*, 24 A. D. 2d 609 [2nd Dept.]; *People* v. *Perry*, 24 A. D. 2d 611 [2nd Dept.]).

With respect to our contention that Reisch is entitled to a separate hearing, as aforesaid, we call attention to the

comments of the district attorney and the Court, made at the conclusion of the testimony, and aforequoted in detail, that "no hearing was ever asked for with regard to the voluntariness of the confession under the *Jackson* case, or any other" (as said by the Court (A374)).

At the time of the trial there was no statutory or judicially authorized pre-trial procedure to suppress admissions or confessions laimed to have been taken in violation of the defendant's constitutional rights to be represented by counsel, such as there existed with respect to a motion to suppress by reason of illegal search and seizure under §§813-c, d and e of the Code of Criminal Procdure, and as now exists under §§813-f, g, h and i of the Code, effective July 16, 1965. In *People* v. *Davis,* N. Y. L. J., October 16, 1964, p. 19, the Supreme Court, Queens County, Joseph M. Conroy, J., denied a pre-trial motion to suppress admissions allegedly taken in violation of the defendant's constitutional right to be represented by counsel on the ground that

> "The court at the present time has no legal procedure available for the suppression of intangible evidence consisting of statements, admissions or confessions, and until the Legislature acts in this area in view of the recent decision of Escobedo v. Illinois (84 S. Ct. 1758) there is no remedy available."

It is to be pointed out that under the new §813-h, subd. 2 of the Code, the failure to make a pre-trial motion shall not be deemed to have waived any objection during trial to the admission of a confession or admission on the ground that it was involuntarily obtained.

It may not be argued that since Reisch allegedly made other admissions on the street prior to being taken to the

squad room, the admissions made at 400 Broome Street were merely surplusage and the points herein raised are only technical. Clearly, the errors are substantial, affecting the constitutional rights of petitioners Reisch and Kolitch. Furthermore, it cannot be said which admissions were relied upon by the jury, or that the jury did not rely upon any admissions (see *People* v. *Donovan,* 13 N. Y. 2nd 148, 150; *People* v. *Gunner,* 15 N. Y. 2d 226, 230; *People* v. *Perry,* 24 A. D. 2d 611 [2nd Dept.]).

Of course, it was this Court's holding in *Jackson* v. *Denno,* 378 U. S. 368, which admittedly mandated the separate hearing as to voluntariness of a confession prescribed in *People* v. *Huntley,* 15 N. Y. 2d 72.

POINT III

The use of an uncorroborated and uninvestigated statement of an unidentified informer did not constitute probable cause sufficient to justify a search or an arrest.

The presence or absence of reasonable cause to justify an arrest without a warrant depends on whether the officers "in good faith believed that defendant was guilty of a felony and whether this belief rested on grounds which would induce an ordinarily prudent and cautious man under the circumstances to believe otherwise" (*People* v. *Santiago,* 13 N. Y. 2d 326; See, also, *People* v. *Coffey,* 12 N. Y. 2d 443, 451; *Brinegar* v. *United States,* 338 U. S. 160, 175-176).

Although the ultimate burden of proof to sustain the claimed illegality of the search and seizure may be upon the defendant, the duty to go forward initially with the proof to support the legality of the search and seizure is upon

the prosecution (*People* v. *Walton*, 24 A. D. 2d 640, 641 [2nd Dept.]; see *People* v. *Malinsky*, 15 N. Y. 2d 86, 91, footnote 2.

As noted in our factual recitals, *supra*, the detectives' entire information was based upon the statements of the unidentified confidential informant, plus the observations made by the police and the statements made by the defendants. The observations made by the police consisted of seeing the truck on Broadway and 20th Street and the three defendants in conversation nearby. Two defendants went in the truck to East 18th Street where the third defendant (Reisch) was waiting for them. Five or six cartons were unloaded from the truck and Reisch brought two of the cartons into the store. There was no covering over the cartons and there was no attempt at concealment. The occurrence took place at about 3:00 P.M. on a weekday. No argument is needed to establish that the factual elements in these observations contributed in no significant legal way to any belief or cause to believe on the part of the police, on any reasonable or probable basis, that a felony had been committed and that petitioners had committed it (see *People* v. *Malinsky*, 15 N. Y. 2d 86, 94; *People* v. *Brown*, 225 N. Y. S. 2d 157, 160 [not officially reported] [Co. Ct., Queens Co., Shapiro, J.] discussed *supra* under Point 1).

The unsatisfactory and even evasive answers obtained by the police from the defendants before Detective Shannon took Reisch back into the store, which is when, we submit, Reisch was arrested, as shown in Point 1, *supra*, likewise do not of themselves aid in the establishment of reasonable or probable cause, for the officers did not then know that a felony had been committed, nor did they have any reasonable basis for the belief therefor, aside from the informer's information.

There was, therefore, no independent evidence sufficient to corroborate the informer's story of stolen merchandise and to establish *per se* probable cause. The whole structure of probable cause in the case at bar must depend upon acceptance of Shannon's testimony with respect to the tip given him by the informer. We contend, therefore, that the principles laid down in the *Malinsky* case, *supra,* are applicable here, and that the name and identity of the informer should have been disclosed by the prosecution or that the informer should have been produced by it, as requested by defense counsel on the motion to suppress, and which the Court refused to direct (A74), and which request was renewed upon the trial and was again denied (A145-A152), before probable cause may be found to exist in the case at bar.

Defense counsel argued on the motion and at the trial that there was no such informer in existence. We note some highly unusual bits of testimony in this respect. Detective Shannon, a police officer for nineteen years and a detective with the Safe, Loft and Truck Squad for twelve years (A130-A131), testified that he did not remember the telephone number of the informer and he had thrown away the paper on which he wrote it (A48). Detective Carlopio did not know who the informer was and had never met him (A71). It seems strange that Shannon did not tell his brother officer and partner the source of his information. Carlopio did not see the piece of paper with the number; he did not even know if Shannon wrote the number down (A72-A73). Carlopio testified that Shannon told him that the informer said the truck would be in the vicinity of 19th Street and Broadway at approximately 3 o'clock (A54), while Shannon testified that the informer told him that the truck would be on 18th Street and Broadway at about 2:00 P. M. (A36, A52).

It is the position of petitioners that the Court's refusal on the motion to suppress and again upon trial to permit the disclosure of the name of the informer or to direct his appearance for interrogation by the attorneys for the petitioners was erroneous and highly prejudicial, since it deprived petitioners of the opportunity to test by the only available method the credibility of the arresting officers on the question as to whether or not there had been any informer who triggered the arrest, and thus made a fair hearing on the question of probable cause impossible.

In *People* v. *Malinsky*, 15 N. Y. 2d 86, the Court of Appeals held (at pp. 93-94):

> "Disclosure of the informer's identity is required only in those cases, . . . where there is insufficient evidence apart from the arresting officer's testimony as to the informer's communications, to establish probable cause. Where such separate evidence exists, the arrest and consequent search will be upheld without requiring disclosure of the informer. But where disclosure is demanded by the requirements of a fair trial—where, in other words, to refuse disclosure would completely deprive the defense of the opportunity of showing that there was in truth no reliable informer or, if there was, that his communication to the police was different from that testified to and that, for either of these reasons, the police did not have probable cause to make the arrest—the prosecution must either disclose or run the risk of having the arrest and search held illegal".

The holding in *Malinsky* that on the state of the record as it then existed in that case disclosure of the informer was required, for without the informer's information there

did not exist probable cause, is directly applicable to the facts in the case at bar.

In *Malinsky,* Detective Sullivan's testimony that previous tips of the unnamed informant had "proved correct" on other occasions was not sufficient to establish the informer's reliability. In our case, we have a similar conclusory assertion by the detective.

In *Malinsky,* "It was not until after the arrests had been effected that the officers learned that the cartons and the goods contained in them had, in fact, been stolen from Whippet's Motor terminal in Boston. Moreover, since the informer had not described either the goods or how they were packed, and the cartons had no identifiable markings on them, the detectives apparently had no way of knowing, prior to making the arrests, that the boxes in question contained the stolen merchandise of which the informer spoke or, indeed, any other" (p. 89).

Every one of these words, except the place of the larceny, applies to the case at bar. It was not until after the arrest had been affected that the officers learned that the cartons had been stolen from the Gillette Terminal in Chicago. The cartons had no identifiable markings on them (other than Gillette) and the detectives had no way of knowing, prior to making the arrest, that the cartons contained the stolen merchandise of which the informer spoke or, indeed, any other.

The proof in the *Malinsky* case is even stronger than the case at bar because the informer there stated that Malinsky and Lustigman (two defendants) were involved. In the case at bar, no identification or description of the individuals who would be in possession of the cartons was given by the informer.

As *Malinsky* pointed out, this Court in *Roviaro* v. *United States*, 353 U. S. 53, 59, 61, held that the Government's privilege of non-disclosure of an informer's identity must give way where "the disclosure of an informer's identity, or of the contents of his communication . . . is essential to a fair determination of a cause." And as *Roviaro* showed (at p. 61), the Government has been required to disclose the identity of the informant unless there was sufficient evidence apart from his confidential communication to sustain such a finding.

The additional evidence may be furnished by an independent witness to that communication, such as a district attorney (See *People* v. *Coffey*, 12 N. Y. 2d 443, 452), or by proof as to the reliability of the informer. Neither type of corroboration exists in the case at bar. The prosecution may argue that a truck answering the description appeared in the indicated area at the approximate time, thus corroborating the informer. This argument falls because the facts observed have no significance without the tip. Again, as was said in *Malinsky* (at p. 95):

> "True, the officers did see Malinsky and Lustigman, as well as the third defendant, placing cartons on a truck at the building but, quite obviously, these observations did not constitute independent evidence sufficient to corroborate the informer's story of a crime or, in and of themselves, establish probable cause for an arrest. Indeed, the officers had no way of knowing, except insofar as it was perhaps indicated by the informer's tip, the the defendants were wrongfully on the premises or that the cartons were stolen or contained stolen merchandise."

To summarize this discussion, we beg leave again to resort to the language of *Malinsky* which most aptly ex-

presses the argument made by defense counsel in the hearing, on the trial and in this appeal (at p. 95):

> "We agree with the defendants that the whole structure of probable cause depends upon acceptance of Sullivan's testimony that a reliable unnamed informer was the source of his information. This being the case, unless the prosecution is required to disclose the informer's identity—so that he may be produced for possible questioning—the defendants will be denied the opportunity, to which they are entitled, of rebutting the detective's crucial testimony by showing, perhaps, that there was no informer, or, if there was, that he was unreliable to the knowledge of the police or that the information he gave was other than as testified to."

We urge that *Malinsky* is applicable even if it be assumed that Reisch was not under arrest but was merely being "detained" at the time when Shannon marched him back into the store. We have no intention of undermining in the slightest degree our argument under Point I, *supra;* we state only that if we are in error under Point I, Point III is still valid and disclosure of the informant's name and identity is still required before probable cause may be found to exist in the case at bar.

"In the first instance, the 'detention' must be for some cause amounting to *justifiable suspicion*" (Sobel, *Current Problems in the Law of Search and Seizure,* p. 63) (Italics in original); see also, *People* v. *Adorno,* 37 Misc. 36, 38 (Crim. Ct., Ringel, J.). We again stress, as we did under Point I, *supra,* that the police must not exercise dominion or control of the suspect or of his possessions, or else it would be an arrest (Sobel, *op. cit., supra,* p. 64). Assuming petitioner Reisch to be merely under detention

upon "justifiable suspicion", whether the detectives' suspicions are capable of being justified turns on the credibility of Detective Shannon. A fair hearing requires that the name or identity of the informer be disclosed, for this is the only available method of testing Shannon's credibility.

Of course, a search not based upon consent or a warrant is deemed reasonable only if conducted as incident to a lawful arrest. *Beck* v. *State of Ohio,* 379 U. S. 89; *Henry* v. *United States,* 361 U. S. 98. Where the identity of the informant is not disclosed, there must be sufficient additional proof to sustain a finding of probable cause. *Scher* v. *United States,* 305 U. S. 251.

Conclusion

The several foregoing reasons for certiorari herein present substantial and important questions. They are of a type arising in other trials. Enough uncertainty and difference of opinion exist as to applicable law to render clarification desirable. So far as these petitioners are concerned, the effect of the various challenged rulings was such as to be productive of an unjust result and an unwarranted conviction.

The petition for a writ of certiorari should be granted.

May 16, 1966.

Respectfully submitted,

JACOB W. FRIEDMAN,
Attorney for Petitioners.

BERNARD JAY COVEN,
Of Counsel.